

STATE'S RESPONSE TO DEFENDANT'S MOTION TO REMAND FOR NEW FINDING OF PROBABLE CAUSE

Under Rule 12.9, Ariz. R. Crim. P., unless the defendant raises a timely motion to remand to the grand jury for a new finding of probable cause, he waives any challenge to the grand jury proceedings. Also, grand jurors are presumed to be unbiased.

The State of Arizona, by and through undersigned counsel, opposes the defendant's motion for remand, for the reasons stated in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court must deny the motion because the defendant failed to file the motion within the time limits imposed by Rule 12.9(b), Ariz. R. Crim. P.

THE FACTS CONCERNING THE HOMICIDE:

On August 14, 1997 Phoenix police were called to a residence located at 2225 N. 37th Avenue in Phoenix. At that time, the residence was occupied by the defendant; his brother Wayne Cotton; his sister Geraldine Cotton; Geraldine's daughter; and the defendant's pregnant girlfriend, Lashawn Wells and her three children. Upon their arrival, the officers were met by the defendant and his brother, who stated that Lashawn Wells had shot herself. The victim was discovered on the living room floor still alive and suffering from a bullet wound to the back of her head. She was immediately transported to St. Joseph's Hospital in an effort to save her life and that of her unborn baby.

At the crime scene, a rifle casing was found on the floor in a hallway. The murder weapon, an assault rifle with blood on it, was found in a bedroom closet. Blood splatter appeared down the hallway as well as in the living room. During an interview, the police confronted the defendant with this incriminating information and the fact it was

impossible that the victim shot herself in the back of the head. The defendant then revised his story and admitted he was carrying the rifle when it accidentally misfired and shot the victim. The oldest minor child claimed that she heard arguing before the gunshot.

The victim's minor child lived for 20 hours before expiring and the cause of death was the trauma inflicted on her mother. Lashawn Wells survived.

THE LAW:

A. The motion was untimely.

Pursuant to Rule 12.9, Ariz. R. Crim. Proc., the defendant's motion is untimely. A motion to remand for a new finding of probable cause may be filed only after an indictment has been returned and "no later than 25 days after the transcript and minutes of the grand jury proceedings have been filed or 25 days after the arraignment is held, whichever is later."

By failing to comply with the timeliness requirement of the rule, a defendant waives any objection to the grand jury proceedings. *State v. Mulligan*, 126 Ariz. 210, 213, 613 P. 2d 1266, 1269 (1980). If a defendant requests an extension of the time limit before the time has expired, the trial court has the discretion to extend this time limit, but the court may not grant an extension after the time has expired. *Maule v. Superior Court*, 142 Ariz. 512, 515, 690 P. 2d 813, 816 (App. 1984). The *Maule* Court stated, "the rule is not 'jurisdictional,' in the sense that a trial court has no authority to grant a request for extension; however, the rule is 'mandatory,' in the sense that the trial court has no authority to grant an extension that is not made on a timely basis." *Id.*

In this case, defense counsel was appointed within the 25-day time period provided by Rule 12.9(b). The defense failed to timely request an extension of the Rule 12.9(b) time limit. Because the defendant did not timely request an extension of the time limit, this Court must deny the motion to remand as untimely.

However, in the event this Court grants the defendant's untimely motion for extension of time, the State maintains defendant's motion for remand is meritless.

B. The grand jurors are presumed to be unbiased and the defendant did not present evidence to support his allegations that the grand jurors were biased.

Defendant alleges that this court must presume he was denied a substantial procedural right to a grand jury, but his allegation is groundless. An accused has a due process right to an unbiased grand jury. *Crimmins v Superior Court*, 137 Ariz. 39, 668 P. 2d 882 (1983). However, it is presumed that an empanelled grand jury is both qualified and unbiased, based on the admonishments given, the examinations conducted and the individual voir dire. As the Arizona Supreme Court stated in *State ex rel. Hastings v. Sult*, 162 Ariz. 112, 114, 781 P.2d 590, 592 (1989):

Statutes and rules secure an unbiased grand jury largely without defendant's or his attorney's participation. The court examines, or voir dices, the grand jurors to determine that each juror is a qualified elector of the county and can sit impartially. See Ariz. R. Crim. P. 12.1(b), 17 A.R.S. In addition, the jurors are informed of their duty to disqualify themselves from sitting on a particular matter in which they have a conflict of interest. See Ariz. R. Crim. P. 12.1(d)(3), 17 A.R.S. Generally, and as occurred in this matter, the jurors are reminded of this duty after identification of the parties in the matter under consideration.

Absent facts to the contrary, the actions of the grand jury are presumed lawful. *Franzi v. Superior Court*, 139 Ariz. 556, 564-65, 679 P.2d 1043, 1051-52 (1984); *State ex rel. Hastings v. Sult*, *id.*

Under Rule 12.3, Ariz. R. Crim. Proc., before a defendant can allege that he was denied due process by a partial or biased grand jury, he must support that allegation with prima facie evidence. *State ex rel. Hastings v Sult*, *id.* "Certainly, a prima facie case of bias or prejudice cannot be established simply with a few newspaper article on a matter." *Id.* at 115, 781 P.2d at 593.

In *State v. Urrutia*, 24 Ariz. App. 439, 539 P. 2d 913 (Ariz. App. 1975), the Court of Appeals refused to require the trial court to conduct an independent voir dire of the grand jurors on the defendant's claim that the grand jury was biased against him.

Further, in this case, as a matter of caution, Deputy County Attorney Kim Stuart specifically conducted a voir dire of the grand jurors concerning anything they may have read, seen, or heard concerning the matter before them and whether any of them had any knowledge of the crime. Deputy County Attorney Vince Imbordino also informed the grand jurors of the names of the victims and gave them a short summary of the facts. Several of the grand jurors admitted having knowledge of the newspaper articles concerning the crime. Nevertheless, all of the grand jurors stated that they could remain impartial and render an impartial decision.

Mr. Stuart specifically asked:

Would the fact that you have been exposed to media coverage in any way interfere with or hinder your ability to act fairly and impartially and without prejudice in connection with this matter?

(NO RESPONSE)

Mr. Stuart: I take it by your silence that there would be no one whose ability will be so hindered.

I take it by your silence that each of you will be able to act fairly, impartially and without prejudice in rendering a decision in this matter.

Mr. Stuart then further admonished the grand jurors that their decision must be based solely upon the evidence presented.

Based upon both their earlier admonishments, A.R.S. § 21-409, and the instructions given by Mr. Stuart, the grand jurors had a duty to come forward and disqualify themselves if they felt they could not be impartial or unbiased. Nothing in the record supports the defendant's claim that the grand jurors were biased against him.

In *State v Gretzler*, 126 Ariz. 60, 68, 612 P. 2d 1023, 1031 (1980) the defendant made the very same allegation. The Supreme Court stated:

The ultimate question in cases where it is alleged that a grand jury is tainted is whether each "juror can base his decision solely on the evidence presented to him and the law." *State v. Salazar*, 27 Ariz. App. 620, 624, 557 P.2d 552, 556 (1976). The record indicates that the jurors were instructed as to the need for impartiality. Just prior to presenting the Sandberg case, [the prosecutor] admonished the jurors at length that they must excuse themselves if they could not decide the case solely on the evidence and without considering anything they might have learned from the news media. All the jurors agreed that they would confine their deliberations to the facts before them. There is no evidence before this court to indicate that any of the grand jurors based their decisions on evidence other than the evidence presented. We find no error.

These facts are identical to what occurred in the case at bar. There is no evidence to support the defendant's claim. Alleging that the television broadcast might have influenced the grand jurors is not sufficient to allow a presumption that the other jurors who did not see the broadcast were either biased or prejudiced.

C. Presenting a draft indictment to the grand jury in no way usurps the role of the grand jury.

The prosecutor informed the grand jurors that they had the option to accept or reject the draft Indictment when he handed it to them after they already rendered their decision.

In *Baines v. Superior Court*, 142 Ariz. 145, 152, 688 P.2d 1037, 1044 (App. 1984) the Court of Appeals ruled that the grand jury was not abused by the prosecutor's preparation in advance of a draft indictment. The Court stated:

No abuse can be found here, particularly in light of the fact that the prosecutor repeatedly advised the grand jury of its right to add to or delete from the draft indictment, to call additional witnesses, to receive additional legal advice from the prosecutor or to terminate the proceedings with no indictment.

It appears that the grand jury in *Baines* had not even deliberated at the time the prosecutor gave them the draft indictment. In this case, the grand jurors already had rendered their decision, making them less likely to be persuaded. Attached is a copy of the admonitions that were given to the grand jurors and recorded, advising them of their duties in handling the proposed draft indictment. The prosecutor advised the grand jurors that they had the option to accept the draft indictment, change it, or reject it. There was no error and the defendant is not entitled to any relief.

CONCLUSION:

The defendant's motion to remand the case to the grand jury was untimely and therefore this Court should not consider it. Even if this Court chooses to consider the untimely motion, this Court should deny the motion because the defendant's procedural rights to a fair and impartial grand jury were not compromised.